Allianz General Insurance Co (M) Bhd v Gham Poh Chai

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24NCC-614–12 OF 2024
YUSRIN FAIDZ JC
4 AUGUST 2025

Civil Procedure — Injunction — Fortuna injunction — Application to restrain respondent from presenting winding up petition — Court ordered insurer to pay insured under insurance policy ('judgment sum') — Failure of insurer to pay judgment sum — Insured issued statutory notice pursuant to s 466(1)(a) of the Companies Act 2016 ('the CA') — Whether presentation of petition an abuse of court — Whether irreparable harm to commercial standing and reputation would be caused to insurer — Whether insured entitled to issue statutory notice under 466(1)(a) of the CA — Whether insured failed to comply with mandatory requirement under s 195 of Financial Services Act 2013 ('the FSA')

Insurance — Motor insurance — Insurer's liability to satisfy judgment — Whether original insurance claim effectively replaced by judgment — Whether insurers liability crystallised — Whether insurer's reliance on Bank Negara Malaysia's Claims Settlement Practices guideline ('BNM Claims Settlement Practices') to justify withholding payment of judgment misconceived — Whether BNM Claims Settlement Practices relevant when claim still under evaluation and not adjudicated

The sessions court entered judgment against the applicant, ordering it to pay the respondent, who was the insured under a private vehicle policy, the sum of RM208,500 together with interest at the rate of 5%pa and costs of RM12,000. Despite this, the applicant did not make payment, and continued to request additional documents, asserting that the claim involved a vehicle classified as 'Beyond Economic Repair' ('BER'), and that such documents ('BER documents') were required under the applicable insurance policy and guidelines issued by Bank Negara Malaysia ('BNM') on 1 July 2024. The respondent nevertheless took the position that the judgment had been obtained through a court process, and that the applicant was under a legal obligation to comply with the judgment regardless of any unresolved insurance formalities. Therefore, the respondent issued a statutory notice pursuant to s 466(1)(a) of the Companies Act 2016 ('the CA') demanding payment of the judgment sum. The said statutory notice was received by the applicant on 5 December 2024. Nevertheless, by letter dated 23 December 2024, the applicant reiterated its demand for the BER documents to be furnished. Without issuing any specific denial to the statutory demand and apprehending

that a winding up petition might imminently be presented, the applicant filed this originating summons seeking urgent relief in the form of a Fortuna injunction on the grounds that: (a) the presentation of such a petition would constitute an abuse of the court's process and inflict irreparable harm upon its commercial standing and reputation; (b) the respondent was not entitled to issue a statutory notice under s 466(1)(a) of the CA until the requested documents were furnished; (c) while the sessions court judgment fixed the quantum payable, it was silent as to the method of payment, which, according to the applicant, ought to be governed by the applicable BNM guidelines; and (d) the intended petition had no chance of success based on the respondent's alleged failure to comply with the applicant's request for documentation relating to the classification of the vehicle as BER. The respondent further contended that the respondent had failed to comply with the mandatory requirement under s 195 of the Financial Services Act 2013 ('the FSA'), which stipulated that written approval from BNM must first be obtained before any winding up proceedings may be initiated against a licensed financial institution. The absence of such prior approval rendered the statutory notice invalid, thereby tainting any subsequent winding up petition and constituting an abuse of the court's process.

Held, dismissing the applicant's application with costs:

(1) The BNM claims settlement practices showed that, while an insurer may require the claimant to furnish supporting documents before disbursing payment, this requirement presupposes that the claim was still under evaluation and had not yet been adjudicated. Once the matter had proceeded to court and culminated in a final judgment, the insurer's discretion to accept or reject the claim ceased to operate. The original claim was effectively replaced by the judgment, which crystallised the insurer's liability. Compliance with that judgment was no longer contingent upon outstanding documentation, and any attempt to impose such a condition post-judgment was contrary to the finality of the court's decision. Therefore, the applicant's reliance on BNM's claims settlement practices guideline to justify withholding payment of a judgment sum was misconceived (see para 23).

(2) The judgment in question was delivered on 12 July 2024, in a suit filed as early as 10 January 2023. It was clear that the guideline which was issued on 1 July 2024 did not form part of the evidential or legal framework during the sessions court proceedings, nor could it have been raised or considered by the trial court when determining liability. The applicant could not now retroactively invoke a regulatory guideline issued after the close of pleadings and shortly before judgment to impose fresh conditions on its obligation to comply with the court's order. Once

judgment was entered, the duty to satisfy it arose from the judgment itself, not from subsequent administrative or regulatory instruments (see para 24).

(3) Upon receipt of the statutory notice, the applicant remained silent on the issue of s 195. No inquiry was made as to whether the respondent intended to comply with the same. Instead, the applicant assumed, without basis, that the respondent would proceed unlawfully. This assumption, made without any effort to clarify the respondent's position, formed one of the basis of the applicant's attempt to restrain the respondent's statutory rights. While the applicant invoked the regulatory safeguard of s 195, its conduct as well as its late filing for injunctive relief suggested a more tactical aim to gain advantage from silence, rather than any genuine concern with statutory compliance (see para 28).

(4) Section 195 of the Act did not prohibit the respondent from issuing the statutory notice in this case. What it prohibited was the presentation of a winding up petition without first obtaining the prior written approval of BNM. Should the respondent proceed to file a petition without such approval, that step may then be challenged and, if warranted, injuncted and/or set aside. At this juncture, however, no petition had been filed or was shown to be imminent. Section 195 of the Act could not therefore be invoked to invalidate the statutory notice or to restrain the respondent from exercising its statutory entitlement to serve the notice and seek BNM's approval in due course for the presentation of the intended petition (see para 31).

(5) The jurisdiction to wind up a company could not be restrained merely because the debtor raises a technical or procedural objection that did not go to the existence of the debt. The judgment debt in the present case was final and undisputed. The applicant's complaints regarding method of payment, regulatory compliance, or reputational harm did not constitute a genuine dispute over the debt. There was therefore no proper basis to grant injunctive relief (see para 32).

(6) Where a debt was not genuinely disputed, and especially where it had been confirmed by final judgment, the argument of irreparable harm could not succeed. The so-called irreparable harm was speculative and did not alter the legal reality that a judgment debt remained unpaid (see paras 33–34).

(7) The applicant had not provided any concrete proof of solvency or shown that it was in a financial position to immediately satisfy the judgment. While it may be tempting to assume that an insurance company, by virtue of their size and declared assets, were financially sound, such assumptions carry little legal weight. The test for commercial solvency was not based on balance sheet strength or theoretical asset values, but on

whether the company could meet its debts as they fall due. It was well settled that a company may appear robust on paper yet still be commercially insolvent if it withheld payment of a clear and immediate liability. Where a final judgment had been entered, the obligation to pay was immediate, and attempts by insurers to delay compliance through procedural manoeuvring or regulatory technicalities could not be condoned (see para 35).

(8) The applicant could not simultaneously claim to be solvent and willing to pay, while refusing to honour a final judgment. If the applicant sought to avoid the consequences of winding up, the proper course was to pay the amount adjudged as due. The court could not permit a party to shield itself behind reputational concerns when the legal obligation to pay had been finally determined (see para 36).

(9) The present application bore the familiar hallmarks of a tactical response, invoking procedural devices not out of genuine legal necessity, but to defer payment and frustrate enforcement. The Fortuna injunction was thus characterised as a calculated manoeuvre to delay the respondent's lawful exercise of statutory rights under the guise of preserving corporate reputation. Accordingly, there was no basis to conclude that irreparable harm justified the grant of an injunction in the present case. The debt was clear and undisputed. The supposed reputational injury, even if genuine, did not override the respondent's statutory right to pursue enforcement of a final judgment through the winding up process (see paras 38–39).

[Bahasa Malaysia summary

Mahkamah sesyen telah memasukkan penghakiman terhadap pemohon dengan memerintahkannya membayar kepada responden, iaitu orang yang diinsuranskan di bawah polisi kenderaan persendirian, sejumlah RM208,500 berserta faedah pada kadar 5% setahun dan kos sebanyak RM12,000. Walau bagaimanapun, pemohon tidak membuat pembayaran tersebut dan terus meminta dokumen tambahan dengan menyatakan bahawa tuntutan itu melibatkan sebuah kenderaan yang diklasifikasikan sebagai 'Beyond Economic Repair' ('BER'), dan bahawa dokumen sedemikian ('dokumen BER') diperlukan di bawah polisi insurans yang berkenaan serta garis panduan yang dikeluarkan oleh Bank Negara Malaysia ('BNM') pada 1 Julai 2024. Responden tetap berpendirian bahawa penghakiman tersebut telah diperoleh melalui proses mahkamah dan pemohon terikat dengan kewajipan undang-undang untuk mematuhi penghakiman tersebut tanpa mengira sebarang formaliti insurans yang belum diselesaikan. Sehubungan itu, responden telah mengeluarkan notis statutori menurut s 466(1)(a) Akta Syarikat 2016 ('AS') menuntut pembayaran jumlah penghakiman tersebut. Notis statutori berkenaan telah diterima oleh pemohon pada 5 Disember 2024. Namun demikian, melalui surat bertarikh 23 Disember 2024, pemohon sekali lagi mengulangi permintaannya supaya dokumen BER dikemukakan.

Tanpa membuat apa-apa penafian khusus terhadap tuntutan dalam notis statutori tersebut dan bimbang bahawa suatu petisyen penggulungan mungkin akan dikemukakan dalam masa terdekat, pemohon telah memfailkan saman pemula ini bagi mendapatkan relif segera dalam bentuk injunksi Fortuna atas alasan bahawa: (a) pengemukaan petisyen sedemikian akan merupakan suatu penyalahgunaan proses mahkamah dan akan mendatangkan kemudaratan yang tidak dapat diperbaiki kepada kedudukan serta reputasi komersialnya; (b) responden tidak berhak mengeluarkan notis statutori di bawah s 466(1)(a) AS selagi dokumen yang diminta tidak dikemukakan; (c) walaupun penghakiman Mahkamah Sesyen menetapkan jumlah yang perlu dibayar, penghakiman itu tidak menyatakan kaedah pembayaran, yang menurut pemohon hendaklah ditadbir oleh garis panduan BNM yang berkenaan; dan (d) petisyen yang dicadangkan tidak mempunyai sebarang prospek kejayaan berdasarkan kegagalan responden, seperti yang didakwa, untuk mematuhi permintaan pemohon untuk dokumen berkaitan pengelasan kenderaan sebagai BER. Pemohon selanjutnya berhujah bahawa responden telah gagal mematuhi keperluan mandatori di bawah s 195 Akta Perkhidmatan Kewangan 2013 ('APK'), yang menetapkan bahawa kelulusan bertulis daripada BNM hendaklah terlebih dahulu diperoleh sebelum sebarang prosiding penggulungan boleh dimulakan terhadap sebuah institusi kewangan berlesen. Ketiadaan kelulusan awal tersebut menyebabkan notis statutori itu tidak sah, sekali gus mencacatkan mana-mana petisyen penggulungan yang menyusul dan menjadikannya suatu penyalahgunaan proses mahkamah.

Diputuskan, menolak permohonan pemohon dengan kos:

(1) Amalan penyelesaian tuntutan BNM menunjukkan bahawa, walaupun suatu penanggung insurans boleh meminta penuntut mengemukakan dokumen sokongan sebelum pembayaran dibuat, keperluan tersebut tertakluk kepada andaian bahawa tuntutan itu masih dalam proses penilaian dan belum diputuskan. Setelah perkara tersebut dibawa ke mahkamah dan berakhir dengan suatu penghakiman muktamad, penanggung insurans tidak lagi mempunyai budi bicara untuk menerima atau menolak tuntutan tersebut. Tuntutan asal secara efektifnya telah digantikan oleh penghakiman yang mengukuhkan liabiliti penanggung insurans. Pematuhan terhadap penghakiman itu tidak lagi bersyarat kepada dokumen yang masih belum dikemukakan, dan sebarang percubaan untuk mengenakan syarat sedemikian selepas penghakiman adalah bertentangan dengan prinsip kemuktamadan keputusan mahkamah. Oleh itu, pergantungan pemohon pada garis panduan amalan penyelesaian tuntutan BNM untuk membenarkan penangguhan pembayaran jumlah penghakiman adalah khilaf (lihat perenggan 23).

(2) Penghakiman yang dipertikaikan telah diserahkan pada 12 Julai 2024 dalam suatu prosiding yang difailkan seawal 10 Januari 2023. Adalah jelas bahawa garis panduan yang dikeluarkan pada 1 Julai 2024

tidak membentuk sebahagian daripada proses keterangan atau proses undang-undang semasa prosiding di mahkamah sesyen dan tidak boleh dibangkitkan atau dipertimbangkan oleh mahkamah perbicaraan ketika memutuskan isu liabiliti. Pemohon tidak boleh kini secara retrospektif memohon pakai suatu garis panduan yang dikeluarkan selepas penutupan pliding dan hanya beberapa hari sebelum penghakiman bagi mengenakan syarat baharu terhadap kewajipannya untuk mematuhi perintah mahkamah. Setelah penghakiman dimasukkan, kewajipan untuk mematuhinya berbangkit daripada penghakiman itu sendiri dan bukannya daripada instrumen pentadbiran atau kawal selia yang dikeluarkan selepas itu (lihat perenggan 24).

(3) Setelah menerima notis statutori tersebut, pemohon kekal berdiam diri mengenai isu s 195. Tiada inkuiri dibuat sama ada responden berhasrat untuk mematuhi peruntukan tersebut. Sebaliknya, pemohon mengandaikan, tanpa sebarang asas, bahawa responden bertindak secara menyalahi undang-undang. Andaian ini, yang dibuat tanpa sebarang usaha untuk menjelaskan pendirian responden, menjadi salah satu dasar percubaan pemohon untuk menyekat hak statutori responden. Walaupun pemohon memetik perlindungan di bawah s 195, tindakannya serta pemfailan lewat permohonan injunksi menunjukkan tujuan taktikal untuk meraih kelebihan melalui sikap berdiam diri dan bukannya satu kebimbangan tulen mengenai pematuhan statutori (lihat perenggan 28).

(4) Seksyen 195 Akta tersebut tidak melarang responden daripada mengeluarkan notis statutori dalam kes ini. Larangan itu terpakai terhadap pengemukaan petisyen penggulungan tanpa terlebih dahulu memperoleh kelulusan bertulis daripada BNM. Jika responden meneruskan pemfailan petisyen tanpa kelulusan sedemikian, langkah itu boleh dicabar dan, jika wajar, diinjunsikan dan/atau diketepikan. Pada tahap ini, bagaimanapun, tiada petisyen telah difailkan atau dibuktikan sebagai sesuatu yang bakal berlaku dalam masa terdekat. Justeru, s 195 Akta tersebut tidak boleh dipohon untuk membatalkan notis statutori atau untuk menghalang responden daripada melaksanakan hak statutori untuk menyampaikan notis tersebut dan memperoleh kelulusan BNM pada masa yang sesuai bagi pengemukaan petisyen yang dicadangkan (lihat perenggan 31).

(5) Bidang kuasa untuk menggulung sesebuah syarikat tidak boleh dihalang hanya kerana penghutang membangkitkan bantahan teknikal atau prosedur yang tidak menyentuh tentang kewujudan hutang tersebut. Hutang penghakiman dalam kes ini adalah muktamad dan tidak dipertikaikan. Hujahan pemohon mengenai kaedah pembayaran, pematuhan peraturan, atau kemudaratan terhadap reputasi bukanlah merupakan suatu pertikaian sebenar mengenai hutang tersebut. Oleh itu,

A tiada asas yang wajar untuk memberikan relif injunksi (lihat perenggan 32).

(6) Apabila sesuatu hutang tidak dipertikaikan secara tulen, terutamanya apabila ianya telah disahkan melalui penghakiman muktamad, hujahan mengenai kemudaratan yang tidak dapat diperbaiki tidak boleh berjaya. Apa yang didakwa sebagai kemudaratan yang tidak dapat diperbaiki itu hanyalah spekulatif dan tidak mengubah realiti undang-undang bahawa hutang penghakiman tersebut masih belum dijelaskan (lihat perenggan 33–34).

(7) Pemohon tidak mengemukakan sebarang bukti kukuh mengenai keupayaan insolvensi atau menunjukkan bahawa mereka berada dalam kedudukan kewangan untuk melunaskan penghakiman tersebut dengan serta-merta. Walaupun mungkin terdapat kecenderungan untuk mengandaikan bahawa sebuah syarikat insurans, berdasarkan saiz dan aset yang diisytiharkan, berada dalam keadaan kewangan yang kukuh, andaian sedemikian mempunyai nilai undang-undang yang rendah. Ujian bagi solvensi komersial bukanlah berdasarkan kekuatan kunci kira-kira atau nilai aset secara teori, tetapi sama ada syarikat tersebut mampu memenuhi hutangnya apabila tiba masanya untuk dibayar. Adalah menjadi undang-undang mantap bahawa sesebuah syarikat mungkin kelihatan kukuh di atas kertas namun tetap tidak solven dari segi komersial sekiranya mereka menahan pembayaran suatu liabiliti yang jelas dan serta-merta. Apabila suatu penghakiman muktamad telah dimasukkan, kewajipan untuk membayarnya adalah serta-merta dan percubaan oleh syarikat insurans untuk melengahkan pematuhan melalui muslihat prosedur atau teknikaliti peraturan tidak boleh diterima (lihat perenggan 35).

(8) Pemohon tidak boleh pada masa yang sama mendakwa bahawa mereka solven dan bersedia untuk membayar, tetapi enggan mematuhi suatu penghakiman muktamad. Jika pemohon ingin mengelakkan akibat penggulungan, langkah yang sewajarnya ialah membayar jumlah yang telah ditetapkan sebagai terhutang. Mahkamah tidak boleh membenarkan mana-mana pihak berlindung di sebalik alasan berkaitan reputasi apabila kewajipan undang-undang untuk membayar telah diputuskan secara muktamad (lihat perenggan 36).

(9) Pemohonan ini secara jelas mempunyai ciri-ciri biasa suatu tindakan taktikal, yang menggunakan mekanisme prosedur bukan kerana keperluan undang-undang yang tulen, tetapi untuk menangguhkan pembayaran dan menggagalkan tindakan penguatkuasaan penghakiman. Injunksi Fortuna dalam keadaan ini merupakan satu jalan yang dirancang untuk melengahkan pelaksanaan hak statutori responden atas alasan kononnya bagi melindungi reputasi korporat. Justeru, tiada asas untuk menyimpulkan bahawa kemudaratan yang tidak dapat

diperbaiki membenarkan pemberian injunksi dalam kes ini. Hutang tersebut adalah jelas dan tidak dipertikaikan. Dakwaan mengenai kecederaan reputasi, sekalipun benar, tidak mengatasi hak statutori responden untuk meneruskan penguatkuasaan suatu penghakiman muktamad melalui proses penggulungan (lihat perenggan 38–39).]

Cases referred to

Affin Bank Bhd v Datuk Ahmad Zahid bin Hamidi [2005] 3 MLJ 361; [2005] 1 CLJ 521, HC (refd)
Fortuna Holdings Pte Ltd v The Deputy Commissioner of Taxation of the Commonwealth of Australia (1976) 2 ACLR 349; [1978] VR 83, SC (refd)
Kris Heavy Engineering & Construction Sdn Bhd v Lewis & Co (Advocates & Solicitors) [2017] MLJU 906, HC (refd)
Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn Bhd [2002] 3 MLJ 49, CA (refd)
Mobikom Sdn Bhd v Inmiss Communications Sdn Bhd [2007] 3 MLJ 316, CA (refd)
Pacific & Orient Insurance Co Berhad v Mazlan bin Ahmad [2015] MLJU 764, HC (distd)
Pacific & Orient Insurance Co Bhd v Muniammah Muniandy [2010] MLJU 2217; [2011] 1 CLJ 947, CA (refd)
Setia Fontaines Sdn Bhd v Pro Tech Enterprise Sdn Bhd [2023] 12 MLJ 324, HC (refd)
V Medical Services M Sdn Bhd v Swissray Asia Healthcare Co Ltd [2025] 2 MLJ 744, FC (refd)

Legislation referred to

Companies (Winding-Up) Rules 1972 r 23
Companies Act 2016 ss 465(1)(e), 466, 466(1)(a)
Financial Services Act 2013 ss 47(1), 123(1), 143(2), 195, 195(3)

Thayakugan a/l Rajendram (with Sabrina bt Mohamed Ameen and Leong Zheng Yang) (Othman Hashim & Co) for the applicant.
Melissa Kaur Manakh a/p Ram Singh (Melissa Ram) for the respondent.

Yusrin Faidz JC:

INTRODUCTION

[1] This case concerns an application for a Fortuna injunction brought by the applicant to restrain the respondent from presenting a winding up petition. While the legal framework is familiar, the underlying theme is as old as commerce itself: a debtor facing judgment who seeks, not relief from liability, but delay in its enforcement. History is replete with examples of empires and enterprises brought low, not by enemies at the gate, but by administrators

within who, like petty Napoleons, mistake tactical evasion for strategy. The application invites the court to consider whether the machinery of insolvency law is being deployed for its intended purpose or merely as a shield against the ordinary consequences of a final judgment. It raises important questions concerning the proper threshold for injunctive relief, the status of undisputed judgment debts, and the limits of procedural protection when insolvency processes are used to pressure payment.

BACKGROUND FACTS

[2] The material facts giving rise to this application are largely undisputed. On 12 July 2024, the Sessions Court at Kuala Lumpur, in Suit No WA-B52NCC-21–01 of 2023, entered judgment against the applicant, Allianz General Insurance Co (M) Bhd, ordering it to pay the respondent, Gham Poh Chai, who was the insured under a private vehicle policy, the sum of RM208,500 together with interest at the rate of 5%pa and costs of RM12,000.

[3] Subsequently, correspondence between parties ensued concerning the mechanism of payment. On 23 July 2024 and again on 7 October 2024, the applicant requested the respondent to complete an E-Transfer Form and to furnish his income tax number, purportedly as part of an internal payment requirement. The respondent eventually complied on 8 October 2024. Despite this, the applicant did not make payment, and continued to request additional documents, asserting that the claim involved a vehicle classified as 'Beyond Economic Repair' ('BER'), and that such documents ('BER documents') were required under the applicable insurance policy and guidelines issued by Bank Negara Malaysia ('BNM') on 1 July 2024.

[4] The respondent nevertheless took the position that the judgment had been obtained through a court process, and that the applicant was under a legal obligation to comply with the judgment regardless of any unresolved insurance formalities. On 30 November 2024, the respondent issued a statutory notice pursuant to s 466(1)(a) of the Companies Act 2016 ('the CA 2016') demanding payment of the judgment sum. The said statutory notice was received by the applicant on 5 December 2024.

[5] By letter dated 23 December 2024, the applicant reiterated its demand for the BER documents to be furnished. Without issuing any specific denial to the statutory demand and apprehending that a winding up petition might imminently be presented, the applicant filed this originating summons on 26 December 2024 seeking urgent relief in the form of a Fortuna injunction. The applicant contends that the presentation of such a petition would constitute an abuse of the court's process and inflict irreparable harm upon its commercial standing and reputation.

[6] The initial hearing fixed on 28 January 2025 was adjourned following the elevation of my learned brother, Ahmad Fairuz bin Zainol Abidin J, to the Court of Appeal, whereupon the matter was transferred to my court.

[7] The matter came up for hearing on 25 March 2025, during which the parties were partially heard. The hearing was then adjourned to allow for settlement discussions. No interim injunction was granted at that stage, as the respondent informed the court that it had not yet obtained the requisite written approval from BNM to present the intended winding up petition. As the parties were unable to reach a resolution, the application was heard in full on 23 April 2025. Upon careful consideration of the submissions advanced and the applicable legal framework, I delivered my decision on 19 May 2025, dismissing the application with costs of RM10,000. These grounds are now prepared pursuant to the applicant's notice of appeal dated 9 June 2025.

ISSUES

[8] The court must determine the following issues:

(a) whether the intended petition has no chance of success; and

(b) whether such petition might produce irreparable damage to the applicant.

COUNSELS' CONTENTIONS

The applicant's contentions

[9] The learned counsels for the applicant, Thayakugan a/l Rajendram and Sabrina bt Mohamed Ameen submit that the debt in question remains disputed, as payment is contingent upon compliance with BNM's regulatory requirements and the furnishing of certain documents related to the underlying BER documents.

[10] It is argued that the statutory demand issued by the respondent is a tactical move designed to exert undue pressure on the applicant to make premature payment, notwithstanding the unresolved issues, thereby amounting to an abuse of the court's process, as cautioned in *Fortuna Holdings Pte Ltd v The Deputy Commissioner of Taxation of the Commonwealth of Australia* (1976) 2 ACLR 349; [1978] VR 83 (SC).

[11] Counsels further submit that the respondent's intended winding up action is vitiated by a fundamental procedural irregularity. Specifically, the respondent has failed to comply with the mandatory requirement under s 195 of the Financial Services Act 2013 ('the FSA'), which stipulates that written

approval from BNM must first be obtained before any winding up proceedings may be initiated against a licensed financial institution. It is contended that the absence of such prior approval renders the statutory notice invalid, thereby tainting any subsequent winding up petition and constituting an abuse of the court's process.

[12] In support, reliance is placed on *Pacific & Orient Insurance Co Berhad v Mazlan bin Ahmad* [2015] MLJU 764 (HC), where Wong Kian Keong JC (as His Lordship then was) held that s 195 prohibits not only the filing of a winding up petition but also the issuance of a statutory notice where BNM's written approval has not been obtained. In that case, the court granted a Fortuna injunction on the basis that the statutory notice itself was issued in breach of s 195.

[13] Counsels further contend that the eventual presentation of a winding up petition would inflict serious and irreparable damage to its reputation and commercial standing, particularly given its position as a licensed insurer whose business depends significantly on maintaining public confidence, citing *Setia Fontaines Sdn Bhd v Pro Tech Enterprise Sdn Bhd* [2023] 12 MLJ 324 (HC) (per Anand Ponnudurai J) in support.

The respondent's contentions

[14] Learned counsel for the respondent, Melissa Kaur Manakh a/p Ram Singh takes the position that the debt is not in dispute, as it stems from a final judgment of the sessions court. Citing *Pacific & Orient Insurance Co Bhd v Muniammah Muniandy* [2010] MLJU 2217; [2011] 1 CLJ 947 (CA) per Ramly Ali JCA (as His Lordship then was), counsel submits that a judgment debt cannot be the subject of a bona fide dispute unless it has been stayed or set aside, which is not the case here.

[15] Learned counsel further contends that the statutory demand constitutes a lawful and legitimate means of enforcing a judgment debt, and does not amount to an abuse of process. It is submitted that the requirement for BER documents was neither raised nor adjudicated upon during the sessions court proceedings, and thus forms no part of the judgment subsequently entered. In light of the applicant's continued failure to satisfy the judgment debt, the respondent maintains that the applicant is, on the face of the record, deemed unable to pay its debts within the meaning of s 466 of the CA 2016.

[16] In relation to s 195 of the FSA, learned counsel submits that the requirement for BNM's prior written approval arises only at the stage of presenting a winding up petition, and that this does not render the statutory notice itself invalid.

[17] Counsel for the respondent further contends that the applicant's assertions of reputational harm are immaterial in the context of an undisputed judgment debt. The application for a Fortuna injunction is therefore viewed as a strategic delay, aimed at thwarting the respondent's exercise of its lawful statutory rights.

THE COURT'S FINDINGS

General principles

[18] The Fortuna injunction is derived from the Australian case of *Fortuna Holdings Pte Ltd v The Deputy Commissioner of Taxation of the Commonwealth of Australia* where it is essentially a prohibitory injunction catered to restrain the presentation of a winding up petition or prohibiting further steps in an existing winding up petition with the aim of prevention of abuse of the process of court.

[19] The Court of Appeal in *Mobikom Sdn Bhd v Inmiss Communications Sdn Bhd* [2007] 3 MLJ 316 (CA) per Gopal Sri Ram JCA (as His Lordship then was) approved the principles enunciated in Fortuna case. The applicable principles were then succinctly summarised in the case of *Pacific & Orient Insurance Co Bhd v Muniammah Muniandy,* wherein an applicant seeking a Fortuna injunction will have to satisfy the following:

(a) first branch of the principle:

  (i) the intended petition has no chance of success, as a matter of law as well as a matter of fact; and

  (ii) the presentation of such petition (which has not chance of success) might produce irreparable damage to the company.

(b) second branch of the principle:

  (i) whether a petitioner proposing to present a petition has chosen to assert a disputed claim, by a procedure which might produce irreparable damage to the company, rather than by a suitable alternative procedure.

Issue 1: Whether the intended petition has no chance of success

Effect of BNM's claims settlement practices

[20] The first ground advanced to show that the intended petition has no chance of success is the respondent's alleged failure to comply with the applicant's request for documentation relating to the classification of the vehicle as Beyond Economic Repair ('BER'). In support, reliance is placed on

the decision in *Affin Bank Bhd v Datuk Ahmad Zahid bin Hamidi* [2005] 3 MLJ 361; [2005] 1 CLJ 521 (HC), where the High Court affirmed that compliance with BNM guidelines is necessary before certain transactions may proceed. On this basis, the applicant contends that the respondent was not entitled to issue a statutory notice under s 466(1)(a) of the CA 2016 until the requested documents were furnished.

[21] It is argued that while the sessions court judgment fixed the quantum payable, it was silent as to the method of payment, which, according to the applicant, ought to be governed by the applicable BNM guidelines. In this regard, the applicant refers to the document marked as exh LFW8 in encl 2, namely the Claims Settlement Practices Guideline Issued by BNM on 1 July 2024, bearing reference BNM/RH/PD 029–69. The applicant submits that payment of the judgment sum is conditional upon compliance with this guideline.

[22] Upon examining the guideline, it is noted that it was issued pursuant to ss 47(1), 123(1) and 143(2) of the FSA, which empower BNM to prescribe standards of business conduct for licensed insurers and takaful operators. Its stated objective is to promote fair, timely, and transparent claims settlement practices. However, its scope is clearly directed at regulating the handling of claims during the ordinary course of insurance operations.

[23] A careful examination of the relevant clauses in the BNM Claims Settlement Practices shows that, while an insurer may require the claimant to furnish supporting documents before disbursing payment, this requirement presupposes that the claim is still under evaluation and has not yet been adjudicated. Once the matter has proceeded to court and culminated in a final judgment, the insurer's discretion to accept or reject the claim ceases to operate. The original claim is effectively replaced by the judgment, which crystallises the insurer's liability. Compliance with that judgment is no longer contingent upon outstanding documentation, and any attempt to impose such a condition post-judgment is contrary to the finality of the court's decision. Therefore, I am of the considered view that the applicant's reliance on BNM's Claims Settlement Practices guideline to justify withholding payment of a judgment sum is, with respect, misconceived.

[24] Further, the judgment in question was delivered on 12 July 2024, in a suit filed as early as 10 January 2023. It is clear that the guideline which was issued on 1 July 2024 did not form part of the evidential or legal framework during the sessions court proceedings, nor could it have been raised or considered by the trial court when determining liability. The applicant cannot now retroactively invoke a regulatory guideline issued after the close of pleadings and shortly before judgment to impose fresh conditions on its

obligation to comply with the court's order. Once judgment is entered, the duty to satisfy it arises from the judgment itself, not from subsequent administrative or regulatory instruments.

Effect of s 195 of the FSA

[25] The second issue raised in respect to the chance of success is the effect of s 195 of the FSA which bars presentment of a winding up petition without written consent from BNM. For ease of reference s 195 states as follows:

> 195 Winding up by High Court on application by persons other than Bank
>
> (1) *No application for the winding up of an institution or approved person may be presented to the High Court by any person without the prior written approval of the Bank.*
>
> (2) Subject to subsection (1), *where an application for the winding up of an institution* or approved person *is presented to the High Court by a person other than the Bank* —
>
> (a) that person *shall deliver a copy of the application to the Bank at the same time as it is presented*; and
>
> (b) *the Bank shall be party to the winding up proceedings and shall be entitled to appear and be heard in all proceedings relating to the application and to call, examine and cross examine any witness.*
>
> (3) Any person who contravenes subsection (1) or paragraph (2) (a) commits an offence and shall, on conviction, be liable to imprisonment for a term not exceeding five years or to a fine not exceeding ten million ringgit or to both. (Emphasis added.)

[26] In support, the applicant relies on the High Court decision in *Pacific & Orient Insurance Co Berhad v Mazlan bin Ahmad* [2015] MLJU 764 (HC). In that case, the court accepted the argument that issuing a statutory demand without first obtaining BNM's written approval was impermissible under s 195 of the FSA. On that basis, a Fortuna injunction was granted to restrain the presentation of a petition.

[27] With respect, I find that decision distinguishable. In *Pacific & Orient Insurance Co Bhd v Mazlan bin Ahmad,* the applicant had, upon receiving the statutory notice, expressly alerted the respondent to the requirement for prior approval under s 195. In response, the respondent made clear that it did not intend to obtain such approval and would proceed with the petition regardless. The facts therefore disclosed a direct and deliberate intention to bypass the statutory safeguard.

[28] In contrast, no such correspondence or clarification was sought in the present case. Upon receipt of the statutory notice, the applicant remained silent on the issue of s 195. No inquiry was made as to whether the respondent

intended to comply with the same. Instead, the applicant appears to have assumed, without basis, that the respondent would proceed unlawfully. This assumption, made without any effort to clarify the respondent's position, now forms one of the basis of the applicant's attempt to restrain the respondent's statutory rights. There is a certain irony in this approach. While the applicant invokes the regulatory safeguard of s 195, its conduct as well as its late filing for injunctive relief suggests a more tactical aim to gain advantage from silence, rather than any genuine concern with statutory compliance.

[29] A close reading of s 195 confirms that it does not prohibit the issuance of a statutory demand under s 466(1)(a) of the CA 2016. It only prohibits the 'presentation' of the winding up petition itself. Subsection (3) criminalises the act of the presentation of a winding up petition without BNM's approval but makes no mention of preliminary steps such as the issuance of a statutory demand. The distinction between a statutory demand (ie winding up notice) and the presentment of the winding up petition itself is significant:

(a) a winding up notice under ss 465(1)(e) and 466(1)(a) of the CA 2016 is a preliminary step that demands payment of a debt. It serves as evidence of a company's inability to pay its debts, should it fail to respond within 21 days; and

(b) a winding up petition, on the other hand, is the formal process of commencing winding up proceedings before the High Court by way of a petition 'presented at the office of the Registrar' under r 23 of the Companies (Winding-Up) Rules 1972.

[30] In *Pacific & Orient Insurance Co Bhd v Muniammah Muniandy,* the Court of Appeal affirmed that a judgment debt gives rise to a statutory demand unless there is a stay or set-aside. While that case did not deal with s 195 of the FSA, it supports the proposition that the demand itself is a distinct procedural step.

[31] Accordingly, s 195 does not prohibit the respondent from issuing the statutory notice in this case. What it prohibits is the presentation of a winding up petition without first obtaining the prior written approval of BNM. Should the respondent proceed to file a petition without such approval, that step may then be challenged and, if warranted, injuncted and/or set aside. At this juncture, however, no petition has been filed or is shown to be imminent. Section 195 cannot therefore be invoked to invalidate the statutory notice or to restrain the respondent from exercising its statutory entitlement to serve the notice and seek BNM's approval in due course for the presentation of the intended petition.

[32] This conclusion is further reinforced by the recent Federal Court

decision in *V Medical Services M Sdn Bhd v Swissray Asia Healthcare Co Ltd* [2025] 2 MLJ 744 (FC) per Nallini Pathmanathan FCJ. In that case, the Federal Court affirmed that a Fortuna injunction may only be granted where there is a bona fide dispute on substantial grounds. Although the case concerned the interplay between arbitration and insolvency, the principle remains applicable. The jurisdiction to wind up a company cannot be restrained merely because the debtor raises a technical or procedural objection that does not go to the existence of the debt. The judgment debt in the present case is final and undisputed. The applicant's complaints regarding method of payment, regulatory compliance, or reputational harm do not constitute a genuine dispute over the debt. There is therefore no proper basis to grant injunctive relief.

Issue 2: Whether such petition might produce irreparable damage to the applicant

[33] The applicant argues that the presentation of a winding up petition would cause irreparable harm to its reputation, particularly given its position as a reputable insurance company. However, it is trite that where a debt is not genuinely disputed, and especially where it has been confirmed by final judgment, the argument of irreparable harm cannot succeed. This position is clearly established in *Pacific & Orient Insurance Co Bhd v Muniammah Muniandy,* where the Court of Appeal held that once a debt is confirmed by judgment, an application for a Fortuna injunction must fail. The test for such an injunction requires two limbs to be satisfied: first, that the intended petition has no real prospect of success; and second, that it would cause irreparable harm. Where the first limb is not satisfied, the second becomes irrelevant.

[34] Even if the second limb were to be considered, the applicant's complaint amounts to no more than a general fear of reputational damage. As observed by Abdul Hamid Mohamad JCA (as His Lordship then was) in *Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn Bhd* [2002] 3 MLJ 49 (CA), such concerns are insufficient. The so-called irreparable harm is speculative and does not alter the legal reality that a judgment debt remains unpaid. The Court of Appeal in that case described these fears as the usual apprehensions of losing business, goodwill, customers or suppliers. The answer to such fears is straightforward: settle the judgment debt.

[35] Moreover, the applicant has not provided any concrete proof of solvency or shown that it is in a financial position to immediately satisfy the judgment. While it may be tempting to assume that an insurance company, by virtue of their size and declared assets, are financially sound, such assumptions carry little legal weight. The test for commercial solvency is not based on balance sheet strength or theoretical asset values, but on whether the company can meet its debts as they fall due. It is well settled that a company may appear

robust on paper yet still be commercially insolvent if it withholds payment of a clear and immediate liability. Where a final judgment has been entered, the obligation to pay is immediate, and attempts by insurers to delay compliance through procedural manoeuvring or regulatory technicalities cannot be condoned.

[36] In short, the applicant cannot simultaneously claim to be solvent and willing to pay, while refusing to honour a final judgment. As observed in *Kris Heavy Engineering & Construction Sdn Bhd v Lewis & Co (Advocates & Solicitors)* [2017] MLJU 906 (HC) per Mohd Nazlan Mohd Ghazali J (as His Lordship then was), solvency is no defence where the company is nevertheless not ready, willing and able to satisfy the debt. If the applicant seeks to avoid the consequences of winding up, the proper course is to pay the amount adjudged as due. The court cannot permit a party to shield itself behind reputational concerns when the legal obligation to pay has been finally determined.

[37] The present application bears the familiar hallmarks of a tactical response, invoking procedural devices not out of genuine legal necessity, but to defer payment and frustrate enforcement. The Fortuna injunction is thus characterised as a calculated manoeuvre to delay the respondent's lawful exercise of statutory rights under the guise of preserving corporate reputation.

[38] Accordingly, I find no basis to conclude that irreparable harm justifies the grant of an injunction in the present case. The debt is clear and undisputed. The supposed reputational injury, even if genuine, does not override the respondent's statutory right to pursue enforcement of a final judgment through the winding up process.

DECISION

[39] Having considered the evidence and submissions, I am not satisfied that the applicant has established any bona fide dispute in respect of the judgment sum. The debt is clear, final, and remains unsatisfied. The mere assertion of reputational harm or regulatory procedure cannot displace the respondent's statutory entitlement to enforce a judgment through winding up proceedings. In light of these findings, the application for Fortuna injunction in encl 1 is dismissed with costs of RM10,000.

[40] Following the pronouncement of this court's decision dismissing the application in encl 1, learned counsel for the applicant made an oral application for an Erinford injunction pending appeal. I find no real risk of injustice that would justify the grant of such relief. The applicant, being a licensed insurer, is already subject to a regulatory framework that affords it

substantial protection. Under s 195 of the FSA, no winding up petition may be presented against it without the prior written approval of BNM, which functions as a regulatory gatekeeper. Should the regulator consider that compliance with internal documentation, including the BER requirement, remains necessary notwithstanding a final court judgment, it retains full discretion to withhold its approval. These safeguards are statutorily embedded and sufficiently robust. There is, therefore, no proper basis for this court to grant an additional layer of judicial restraint through an Erinford injunction. The oral application is accordingly refused.

Application dismissed.

Reported by K Selvaraju